United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

28 U.S.C.

See Clercus v. ——, Minnesota (1934-35) about.

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 18 1957
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No. 14,146

953

ESTHER EDEN,

Appellant

v.

FRANCIS J. A. LAURIAT, et al,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERMAN MILLER

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Washington, D. C.

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EX 3-0625

STATEMENT OF QUESTIONS PRESENTED

Should the Court have denied the appellant's motion for preliminary injunction restraining foreclosure where it appeared that prior to the sale the appellant had tendered all of the arrears payments, and there was no clear exercise of the right of acceleration permitted in the note by the note holder, prior to the tender of all of the arrears payments.

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	6
ARGUMENT:	
1. The Court apparently did not consider the usual guides in denying appellant's motion for preliminary injunction	6
2. Consideration of the principles of law indicate the appellant's success on the final hearing, which the Court likewise apparently failed to consider, but construed the motion strictly against the appellant instead of liberally in her favor	8
CONCLUSION	9

TABLE OF CASES

Alabama Mfg. Co. v. Robinson, 56 Fed. 690	9
Chicago, Danville & Vincennes R.R. Co. v. Fosdick, 106 U.S. 47, 27 L. Ed. 47	9
Domus Realty Corp. v. 3440 Realty Co., 40 N.Y.S. 2d 269, affirmed 41 N.Y.S. 2d 943	8
Eisenberg v. Plainfield Savings Bank, 138 N.J. Eq. 116, 47 A. 2d 30	8
Fant v. Thomas, 108 S.E. 847 (Va.), 19 A.L.R. 284	9
Perry v. Perry, 88 U.S. App. D.C. 337, 190 F. 2d 601	8
Phillips v. Sager, 51 App. D.C. 103, 276 F. 2d 625	7
Union National Bank v. Matthews, 98 U.S. 621, 25 L. Ed. 188	7, 9
United States v. Forester, 118 F. Supp. 401	9

UNITED STATES COURT OF APPEALS
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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT
AND
APPENDIX

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia denying a motion for a preliminary injunction to prevent a foreclosure sale of a piece of real estate belonging to the appellant under a deed of trust. The United States District Court for the District of Columbia had jurisdiction by virtue of the provisions of Title 11, Section 326, District of Columbia Code, 1951 Ed. Supp. V. This Court has jurisdiction by virtue of the provisions of Title 28, U. S. Code, Sections 1291 and 1292.

STATEMENT OF THE CASE

The appellant in her complaint for an injunction against the appellees, and for declaratory judgment alleged that on November 10, 1952 one Vaghi and his wife owned premises 1834 Newton Street, N. W., in the District of Columbia known as Lot 35 Square 2615 and on that date they executed and delivered to appellees Fitzgerald and McNamara, as trustees, a deed of trust to secure payment of a note of $11,000.00 bearing interest at 5% per annum, and which provided for payment of interest and principal in monthly installments of $82.50 running until paid; each installment when paid to be applied first to interest and balance to principal, the deed of trust being recorded among the land records of the District of Columbia in Liber 9840 folio 563. It recited that in September 1956 the makers of said note and deed of trust defaulted in the payments of the second deed of trust and the property was advertised for foreclosure under said second trust, to be sold subject to the aforementioned first trust under which the appellees were the owners of the note and trustees respectively. At the time and place advertised for said sale under the second trust it was announced that the monthly payments on the first trust was $82.50 per month, and at that time the appellant's agent, who had full power to act for her to purchase the property at foreclosure sale, was informed that the appellee Lauriat would reduce the payments on his said first trust note to $70.00 per month thereafter. Relying upon this representation the appellant's agent bid in said property for the appellant, and a valid trustees' deed to said property, subject to the appellees' first trust, was executed and delivered to her, and she became the owner of the property. At the time of the sale payments of the first trust were overdue which the appellant paid at rate of $70.00 per month, which arrearage at said rate was accepted by the appellees. (App. 1-4). Thereafter there was tendered to the appellee, Lauriat's bank, where the note was held for collection, payments on the due dates, at rate of $70.00 per month for January and February 1957, which payments were returned,

and which were thereafter re-paid twice, with the information forwarded to the bank that the appellee Lauriat had agreed to accept such reduced payments, but nevertheless, said payments were returned. It was further alleged that the appellee Lauriat retained four installments on the first trust at rate of $70.00 per month. (App. 4-5)

The complaint continued that after the third return of the tendered payments, although four payments at the reduced rate were retained, there was forwarded to the collection bank $330.00 representing all of the installments due at rate of $82.50 per month, which would bring the payments current and would pay the May 1957 installment. Appellant alleged it was not until June 27, 1957 she or her agent knew that the $330.00 was rejected without any reason assigned, except that the attorney for the holder of the note declined to accept said back payments, but called for payment of the note in full. A copy of said letter was attached to the complaint and marked Plaintiff's Exhibit No. 1. (App. 4)

Thereafter, although all of the overdue installments had been tendered, appellees' attorney directed the trustees named in the deed of trust to sell the property at public auction, and advertisement of said sale was then proceeding. Unless the Court restrained said sale the appellant would suffer irreparable harm in that her equity in the property would be destroyed, and that the action of the appellees was wrongful in view of the tender made. The appellant alleged the appellee was not entitled to accelerate the balance of the note. The appellant prayed for a temporary restraining order, and after hearing the granting of her motion for a preliminary injunction, and upon final hearing a declaratory judgment be entered declaring the said first trust note was not in default, and the appellees entitled to accelerate the balance (App. 5).

Thereupon the Court granted a temporary restraining order preventing the sale until hearing on the motion for preliminary injunction (App. 5-6).

Thereafter the appellees answered said complaint and in effect denied that anyone for the estate of Frances J. A. Lauriat, personally or by agent, informed the appellant or her agent that the payments would be reduced from $82.50 per month to $70.00, and appellant's agent was on October 15, 1956 advised that payments for August, September and October 1956 had not been paid, to which the appellant's agent requested reduction of the payments to $70.00 per month, and he would see to it that payments were regularly thereafter paid. To this counsel for appellees replied on October 25, 1956 advising the appellant that the reduction would not be granted. The appellees further answered stating that three $70.00 payments were made at the bank, but the note holder does not desire to cut down the payments and therefore there was an arrearage of $37.50 for which a request for payment was made, and a request that payments of $82.50 per month be made. On December 26, 1956 appellees' counsel wrote appellant's agent to the effect that if a payment of $50.00 was not paid to the bank by January, 1957, and all future payments of $82.50 made when due, a foreclosure sale would be ordered. The answer further alleged nothing further was heard until February 4, 1957, when appellant's agent wrote in effect that in the absence of appellant's agent appellees' counsel's letter came and that payment on the account had been received and again requested payments be received at $70.00 per month. To this appellees' reply was in substance that there would be a foreclosure sale (App. 7-12). The answer further stated that since no further information was received the trustees were requested to proceed in accordance with the terms of the trust.

The matter came on for hearing on the motion for preliminary injunction, which motion the Court denied (App. 20).

Thereafter the appellant filed her motion for re-consideration, and attached thereto a copy of all correspondence between the parties concerning the matter (App.13-20). Appellant desires at this point to emphasize the fact that while the note contains an acceleration clause, the appellees did not exercise the acceleration clause prior to the time all overdue payments, at the rate called for in the note were tendered. It was too late thereafter to reject the tender and then exercise the acceleration. The pleadings and the exhibits clearly show that while tender at $70.00 per month only was made prior to May 21st, 1957, the entire arrearage at rate of $82.50 was tendered on May 21st, 1957. That the attorney for the note holder, nor the note holder himself ever made any direct election to exercise the acceleration clause and demand the note in full. Failure by the note holder to exercise the acceleration clause prior to tender of all the overdue payments is a waiver of that right for defaults existing prior to the tender of the overdue payments.

The Court denied the motion for re-consideration (App. 20), and from this order as well as the order denying the motion for preliminary injunction the appeal was noted (App. 21).

STATEMENT OF POINTS

1. The Court, in view of the tender of all overdue payments should have preserved the status quo and prevented the foreclosure sale until the final hearing, especially where great harm would result in denying the motion for preliminary injunction, whereas slight harm would have resulted to the appellees if the motion had been granted.

2. In absence of a clear showing of an exercise of the right to accelerate the entire balance of the deed of trust note by the holder and directed to the appellant or her agent prior to tender of all overdue payments, the holder cannot refuse such tender and then insist upon payment

in full and enforce such demand by ordering a foreclosure of the property.

SUMMARY OF ARGUMENT

1. Since the pleadings and the exhibits show that the note holder has never himself, or by his attorney, exercised the right to accelerate the entire balance of the note prior to May 20th, 1957, when, on this last mentioned date the appellant made tender of all overdue payments on the note, the Court should have liberally weighed the circumstances in favor of the appellant, since irreparable harm results to the appellant in permitting a sale and a forfeiture of the estate, while little advantage is given the appellee, with little corresponding benefit.

2. The likehood of success by the appellant on the merits should have caused the Court to grant the preliminary injunction, since the appellees had not, prior to May 20th, 1957, the date of the tender of all overdue payments on the trust, clearly exercised the right to accelerate the entire balance of the note. All of the correspondence directed to the appellant by the holder of the note or his attorney threatened foreclosure of the trust, but not acceleration of the balance, and such right to accelerate for defaults prior to said tender is lost. Considering this question, the construction of which at this point should have been liberal in favor of the appellant, the Court erred in denying the preliminary injunction.

ARGUMENT

1. The Court should have granted the preliminary injunction. If, at the time of trial, the position of the appellant is held to be correct, great harm is inflicted. Third parties' right may intervene. The estate of the appellant, before she has her day in Court, is forfeited. Whereas, on the other hand, the benefit derived by the appellee is slight. Good title cannot be passed at the sale until this action is finally

determined. The appellee still has his security, and the court could have further protected the appellee by requiring a preliminary injunction bond. If the appellee holder of the note or his attorney had not clearly exercised the right to accelerate the balance of the note because of defaults prior to the time of tender of all arrears, his likelihood of prevailing on the merits are slight and a consideration of this question required the preservation of the status quo.

While it is true the granting or denying of a preliminary injunction is vested in the sound discretion of the Court, yet, it has been held by this Court that the appellate court has broad power in equity to correct the error in denying a temporary injunction to preserve the status quo of the property involved. See Phillips v. Sager, 51 App. D.C. 103, 276 F. 2d 625.

This Court somewhat gave the outline to be considered in this question. It is said that the Court is called upon to consider a series of estimates as to the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from the denial of the preliminary relief, and the probability of the ultimate success or failure of the suit, and by balancing of damage and convenience generally. Perry v. Perry, 88 U. S. App. D. C. 337, 190 F. 2d 601. We respectfully contend the Trial Court did none of these things. Clearly the appellant was vested with an estate, the forfeiture of which is abhorrent.[1] The granting of the preliminary injunction would not have taken away the property right of the appellee, it would have only prevented the forfeiture until the final hearing. Divesting the appellant of her ownership especially in view of the tender made prior to the actual advertising of the sale would be a great penalty and loss, whereas, if the motion had been granted slight injury would have resulted to the appellee. The only damage he would sustain if he is correct in his position would be the delay for which he is compensated under the

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[1] Union National Bank v. Matthews, 98 U.S. 621, 25 L. Ed. 188

preliminary injunction bond and his security still remains unimpaired. Even if the forfeiture is permitted, no particular benefit results to the appellee. He still must wait until the final disposition of the case since good title could not pass under the auction sale until the final disposition of this case, and in such instance the best price could not be obtained since third party purchasers are not inclined to purchase a property the benefit of which must be postponed until the final hearing. All of these militate against the refusal to grant the preliminary injunction. In addition, consideration of the probability of success by the appellant seemed good in the light of the circumstances and the pronouncements of Courts concerning forfeiture of estates, and the necessity of strict performance required of the person who seeks to invoke the forfeiture. These considerations should have caused a liberal construction in favor of the appellant instead of the Court's strict application of the equitable principles, for it seems the guides stated in Perry v. Perry, supra, were not followed.

2. The success of the appellant's position is based upon consideration of the principles of cases involving exercising acceleration clauses. In this case, if the appellee note holder, or his attorney did not exercise the right to accelerate the balance of the note prior to tender of all of the arrearages, that right is waived as to defaults occurring prior to said tender. Of course, the note holder is entitled to the arrears payments tendered, but cannot accelerate the balance of the note for defaults prior to the tender. This was held as to default in interest, and tender before exercising the right to accelerate, in Domus Realty Corp. v. 3440 Realty Co., 40 N. Y. S. 2d 269, affirmed in 41 N. Y. S. 2d 943. The same consideration was afforded in a default in taxes where they were defaulted and then tendered prior to exercise of acceleration. Eisenberg v. Plainfield Savings Bank, 138 N. J. Eq 116, 47A. 2d 30.

Decisions to the same effect were made in Fant v. Thomas, 108 S. E.847 (Va.) 19 A. L. R. 284. In a case where interest was paid six months late, the right to accelerate was lost. Alabama Manf. Co. v. Robinson 56 Fed. 690.

In the instant case, neither the appellee note holder nor his attorney ever stated directly that the acceleration was exercised. The attorney's letters only mention the fact that if the arrears were not paid a foreclosure sale would take place, and this is not a direct election to exercise the acceleration. The only place where some mention is made of an acceleration is in the letter of February 14, 1957 from the trustee Fitzgerald where he mentioned the fact that the attorney states he wants payment of the note in full. No demand is made in this letter by the trustee or that the attorney requested the trustee to make such a demand, and the letter of June 27, 1957 where likewise no direct election is made. In the light of the cases holding that such forfeiture should be avoided and strictly constructed, these two letters cannot be construed as a clear unequivocal election to exercise the acceleration. Union National Bank v. Matthews, supra; Chicago, Danville & Vincennes R. R. Co. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47. In U. S. v. Forester, 118 F. Supp. 401, it was stated that equitable principles will be invoked to relieve a mortgagor from an acceleration of the maturity of the debt and a foreclosure sale.

CONCLUSION

In the light of the above we believe the Court should have granted the preliminary injunction under all of the circumstances, and request this Court to so order.

Respectfully submitted,

HERMAN MILLER

421 4th Street, N. W.
Washington, D. C.

Attorney for Appellant

INDEX

	Record Page	Appendix Page
Complaint for Injunction and Declaratory Judgment	1	1
Plaintiff's Exhibit No. 1, Filed August 1, 1957	4	4
Temporary Restraining Order	5	5
Motion for Preliminary Injunction	7	6
Answer to Complaint for Injunction and Declaratory Judgment	8	7
Motion for Reconsideration of Motion for a Preliminary Injunction and Exhibits attached	17	13
Letter from P. R. Lauriat to Mr. J. G. Stone Filed August 12, 1957	20	13
Letter from Sidney J. Brown to Cornelius H. Doherty, Filed August 12, 1957	22	14
Letter from E. Spencer Fitzgerald to Sidney J. Brown, Filed August 12, 1957	28	15
Letter from Sidney J. Brown to Spencer Fitzgerald, Filed August 12, 1957	29	16
Letter from W. Francis Castle to Samsid Investments Filed August 12, 1957	32	19
Letter from Sidney J. Brown to Spencer Fitzgerald Filed August 12, 1957	33	19
Order Denying Motion for Preliminary Injunction	36	20
Order Denying Motion for Reconsideration of Motion for Preliminary Injunction	37	20
Notice of Appeal	38	21

JOINT APPENDIX

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1 [Filed August 1, 1957]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ESTHER EDEN, No. 2 Thomas Circle, Washington, D. C. Plaintiff v. FRANCIS J. A. LAURIAT, c/o Cornelius Doherty 1010 Vermont Avenue, N. W., Washington, D. C. E. SPENCER FITZGERALD, TRUSTEE 1413 Eye Street N. W., Washington, D. C. JOSEPH M. McNAMARA, TRUSTEE, 1413 Eye Street N. W., Washington, D. C. Defendants	Civil Action No. 1924-57

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT.

The complaint of the plaintiff for declaratory judgment and for injunction restraining foreclosure sale shows unto the Court as follows:

1. The Jurisdiction of the Court is based upon its general equity powers, and under Title 11, Section 326 District of Columbia Code 1951 Ed. Supp V.

2. The parties are all adult citizens of the United States and are believed to be residents of the District of Columbia.

3. Heretofore, to wit: November 10th., 1952 Joseph P. Vaghi and his wife Agnes were the owners of premises 1884 Newton Street N. W., located in the District of Columbia, and being more particularly described as follows:

> Lot numbered thirty-five (35) in Alice T. Matthews and others subdivision of lots in block numbered two (2)

"Ingleside" as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber County 20 folio 54. Said block numbered two (2) being known for assessment and taxation purposes as Square numbered twenty-six hundred fifteen (2615).

4. On the date aforesaid the said Joseph P. Vaghi and his wife Agnes executed and delivered to the defendants Fitzgerald and McNamara, as trustees their certain deed of trust in the original sum of $11,000.00 bearing interest at 5% per annum, securing their note in said sum, upon which interest and principal was stipulated to be at rate of $82.50 running until paid; each installment when paid to be applied first to payment of interest and balance to principal. Said deed of trust being recorded among the land records of the District of Columbia in Liber 9840 folio 563.

5. Heretofore, to wit: September 1956 the said Vaghi having defaulted in the payments on the first and second trust, the holder of the second trust foreclosed the said property and advertised the same to be

2 sold subject to the aforesaid deed of trust as a first trust under which the defendants Fitzgerald and McNamara are named as trustees. The holder of said note secured by said first deed of trust being the defendant Lauriat. The plaintiff says that at the time the bid at said foreclosure sale it was announced that the regular payments due on said first trust were at rate of $82.50 per month, and the plaintiff's agent who was acting for the plaintiff with full power and authority to purchase said property was informed at the time of sale that the said defendant Lauriat would reduce the payments on said note held by him to the sum of $70.00 per month, and thereafter such $70.00 monthly payments could be made on his deed of trust and note. Relying upon these representations, the plaintiff's agent purchased said property at auction and a valid trustees' was executed, delivered and recorded to her and she thereupon became the record legal title holder. At the time of said sale the payments were overdue on said first trust, and in the purchase thereof

the plaintiff assumed payment of said overdue installments. Immediately after the sale to her, the plaintiff caused all of the arrears payments due on the first trust to be paid at rate of $70.00 per month, which were accepted.

6. The plaintiff further says that thereafter there was tendered to the defendant, Lauriat's collection agency, payments on the due date at rate of $70.00 per month for months of January and February 1957, which were returned, and which were thereafter re-paid twice, with the information forwarded to the collection agency that the note holder had agreed to accept reduced payments, and still said payments tendered were returned. Plaintiff says the defendant Lauriat has retained and presently retains four installments made on said first trust at said rate of $70.00 per month.

7. Plaintiff says that after the third return of the payments at rate of $70.00 per month (although four is still retained) there was forwarded to the defendant Lauriat's collection agency the sum of $330.00 representing all installments due at rate of $82.50 which would bring the installments current, which would pay May 1957. Plaintiff says that not until June 27, 1957 did she or her agent know such payments were rejected, without assigning any reason, except that the attorney for the note holder has declined to accept said back payments, but called for full payment of the note. A copy of said letter is hereto attached, to which reference is hereby made and which is marked Plaintiff's Exhibit No. 1.

8. Thereafter, although full tender of all overdue payments had been made, the attorney for the note holder directed the defendant trustees to proceed to advertise said property for sale at public auction which sale is now being advertised to take place on Tuesday, August 6th,

3 1957 at 4 o'clock P.M., and if said sale is held the equity of the plaintiff will be destroyed, and she will suffer irreparable damage, in view of the fact that the defendants are wrongfully and illegally proceeding to attempt to make said sale although the plaintiff had caused all installments to be tendered prior to any advertising. The plaintiff is advised that the defendants were not entitled to accelerate full payment

under the circumstances. Unless said sale is restrained and enjoined the property will be lost to the plaintiff.

WHEREFORE the premises considered the plaintiff prays for (1) process (2) if the defendants cannot be personally served that service by publication be had (3) that the court grant a temporary restraining order without notice in that the motion for preliminary injunction cannot be heard before the date of the sale (4) that the court enter herein a preliminary injunction restraining the said sale pendente lite and upon final hearing grant a permanent injunction (5) that the Court enter herein a declaratory judgment declaring the payments due on the defendants' first trust to be due in monthly installments of $70.00 which was the payments upon which the plaintiff acted in the purchase of said property which action of the defendants amounts to an equitable estoppel and (6) for damages in sum of $5,000.00 against the defendant Lauriat for any loss sustained by the plaintiff and for punative damages against said defendant for his wrongful, wanton and illegal act in attempting for foreclosure plaintiff's property (7) for counsel fees and (8) for general relief.

/s/ Herman Miller
421 4th Street N. W.
Attorney for Plaintiff

[VERIFICATION]

[JURAT]

---

4 [Filed August 1, 1957]

PLAINTIFF'S EXHIBIT NO. 1

June 27, 1957

Mr. Sidney J. Brown,
c/o First National Realty Corp.,
No. 2 Thomas Circle,
Washington 5, D. C.

Dear Mr. Brown:-

I am returning check of Samsid Investments to the order of Clarendon Trust Co., in sum of $330.00 which you sent to me under date of May 22nd., 1957 in tender of back payments on the first trust note on premises 1884 Newton Street N. W.

I am sorry to advise you that the attorney for the note holder has declined to accept the back payments and is calling for full payment of the note under the acceleration clause.

I must therefore advise you that I am proceeding with the foreclosure sale.

Very truly yours,

(s) E. Spender Fitzgerald
Vicepresident

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5 [Filed August 1, 1957]

TEMPORARY RESTRAINING ORDER.

Upon consideration of the application of the plaintiff for temporary restraining order herein, and upon consideration of the verified complaint, it appearing therefrom that the plaintiff has paid installments at rate of $70.00 per month on defendants' first trust and at least four of such installments has been accepted, and it appearing further that after the defendants thereafter rejected tender of such payments the plaintiff then tendered all installments overdue on said first deed of trust prior to any sale, and that such payments were rejected by the defendants, and it appearing further that the defendants are now advertising the plaintiff's property located in the District of Columbia known as 1884 Newton Street N.W., lot thirty-five (35) in Square numbered twenty-six hundred fifteen (2615) for foreclosure sale under said first deed of trust and that said sale is scheduled to be held Tuesday August 6th, 1957 at 4 o'clock P.M., and if said sale is held the plaintiff will be irreparably harmed immediately before the plaintiff can serve notice for a motion for preliminary injunction and a hearing thereon can be had, and thereupon, it is this 1st day of August 1957, by the Court:

ORDERED: That the defendants, and each of them and all persons in active participation and concert with them be, and they are hereby restrained and enjoined from selling, assigning or transfering title to premises 1884 Newton Street N.W., Washington D.C. being lot numbered

thirty-five (35) in Square numbered twenty-six hundred fifteen (2615) and from holding the foreclosure sale advertised to be held Tuesday August 6th., 1957 at 4 o'clock P.M., provided however that the plaintiff first give security in the sum of $100.00 in cash to be deposited into the Registry of this Court for the payment of such costs and damages as may be incurred by any party found to have been wrongfully restrained, and it is further

ORDERED: That this order expire within ten days after entry hereof, unless within such time this order is, for good cause shown, extended for a like period, or unless the defendants consent that it may be extended for a longer period, and it is further

6 ORDERED: That the plaintiff's motion for preliminary injunction be set down for hearing on the 8th day of August 1957 at 11 o'clock A.M. or as soon thereafter as the same may be heard.

By the Court,

/s/ Edward A. Tamm
JUDGE

Issued at 4:05 P.M. this 1st day of August, 1957.

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7 [Filed August 1, 1957]

MOTION FOR PRELIMINARY INJUNCTION.

Comes now the plaintiff by her attorney and moves the Court to grant a preliminary injunction restraining and enjoining the defendants, and each of them, their agents, representatives and associates from proceeding with the advertising of the foreclosure sale, and restraining and enjoining them, and each of them from offering for sale and foreclosing the first deed of trust described in the complaint and from holding the foreclosure sale of premises 1884 Newton Street N.W., Washington D.C. being lot numbered thirty-five (35) in Square numbered twenty-six hundred fifteen (2615) scheduled to be held Tuesday August 6th., 1957 at 4 o'clock P.M. and as reasons refers to the verified complaint filed herein, until further order of this Court

That if said sale is held and a preliminary injunction is not granted the plaintiff will suffer irreparable and irretrevable harm, and she will lose her equity in said property.

And for other and further reasons as will be presented to the Court on the hearing of this motion.

/s/ Herman Miller
421-4th Street N. W.,
Attorney for Plaintiff

POINTS AND AUTHORITIES

1. The verified complaint filed herein.

2. Title 11, Section 326 District of Columbia Code 1951 Ed. Supp. V.

/s/ Herman Miller

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8 [Filed August 8, 1957]

ANSWER TO COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

Comes now the defendants, E. Spencer Fitzgerald, Trustee, and Joseph M. McNamara, Trustee, and Philip R. Lauriat, in his individual capacity and as the Administrator c. t. a. of the Estate of Frances J. A. Lauriat, and aver as follows:

1. Frances J. A. Lauriat, not Francis J. A. Lauriat, was the mother of Philip R. Lauriat, and who died, and by virtue of the administration of her estate the note referred to in the complaint, and hereafter in the answer, is owned by Philip R. Lauriat who placed the note for collection in the Clarendon Trust Company, Clarendon, Virginia. There is attached to this answer a copy of the letters of administration and also a copy of the note.

2. The defendants admit that on November 10, 1952, Joseph P.
9 Vaghi and his wife, Agnes, were the owners of the premises 1884 Newton Street, N. W., and that a first deed of trust was given by them to the defendants, E. Spender Fitzgerald and Joseph M. McNamara, Trustees, to secure the payment to Frances J. A. Lauriat the sum of

$11,000.00, with interest at 5% per annum, payable in monthly installments of $82.50, as evidenced by a note of even date.

3. The trust agreement contained the further statement that upon any default or failure being made in the payment of the said note or any installment of principal or interest thereon, that the trustees, or the survivor of them, shall have the power and it shall be their, or his, duty thereafter to sell the said described land and premises at public auction.

4. The defendants deny that at the alleged foreclosure sale in September of 1956, anyone representing the Estate of Frances J. A. Lauriat, or the holder of the note, Philip R. Lauriat, either personally or through any agent, informed the plaintiff, or her agent, that payments would be reduced from $82.50 a month to $70.00 per month.

5. The defendants further deny that the plaintiff, Esther Eden, has any interest in the property and that her ownership is purely as a straw person for the real owner of the property.

6. In October, 1956, Philip R. Lauriat contacted the undersigned, Cornelius H. Doherty, as his attorney to straighten out the matter of the then default in the monthly payments on the note and it was ascertained that the property was being handled by Mr. Sidney J. Brown of the First National Realty Company, 2 Thomas Circle, N. W., Washington, D. C., and with the additional information that the property was being purchased by him. Under date of October 15, 1956, Mr. Sidney Brown was advised that the payments due for August, September and October, 1956, had not been paid and the following letter was addressed to the undersigned as counsel for Philip R. Lauriat and signed by Sidney J. Brown:

"Please excuse the poor typing since I am without a secretary and I promised to write you by Monday.

"As I advised you on the telephone, at the sale of this property there was exhibited to me a letter from Mr. Lauriat addressed to Mr. Stone, the holder of the 2nd trust, which indicated that the 1st trust holder would accept smaller payments. I believe the foreclosure resulted because the payments were too high and that the pattern for this property has

been set as one of continued trouble and difficulty unless the payments are reduced. Now that I have entered the picture, I can assure you that if the payments are reduced to $7.50 per $1000 per month on the balance which is approximately $9300 making the payment $70.00 in round figures there will be no trouble with it any longer. I will personally guaranty that the payments will be made and you can check the validity of my promises with any bank or title company.

"The settlement on this property is scheduled to take place around the 1st part of November and at that time the payments will be brought up to date and kept that way. Any reduction of course does not affect the interest which continues the same. It only makes the note run a little longer, thus giving the holder more interest, and also clears the air so that he will get a regular payment every month and will not have to bother with wasting time asking for his money."

7. On October 25, 1956, the following ietter was addressed to Mr. Sidney J. Brown:

"I have your letter of October 20, 1956, relative to a reduction of the monthly payments in the matter of the first trust on the property at 1884 Newton Street, N.W., which are presently $82.50 per month.

"I immediately wrote my client, Lt. Lauriat, and I am just in receipt of a letter stating definitely that he does not want the payments reduced and the payments in the original amount must be paid.

"I will appreciate it if you will advise me as to what your intentions are concerning this matter."

Nothing further was heard from Sidney J. Brown and on December 3, 1956, the undersigned attorney wrote the following letter:

"I am advised that three $70.00 payments have been made on the Philip R. Lauriat note at the Clarendon Trust Company which is secured by a first deed of trust on the property at 1884 Newton Street, N.W., Washington, D.C.

"As I have previously advised you, the payments on this note are $82.50 a month and Lt. Lauriat does not desire to cut
11 down these payments so that there is an arrearage of $37.50, and I will appreciate it if you will make this up immediately and that you are to make all further payments to the Clarendon Trust Company on the basis of $82.50 a month."

8. On December 26, 1956, the undersigned attorney addressed the following letter to Mr. Sidney J. Brown:

"On October 25, 1956, I wrote you relative to the note held by Lt. Philip R. Lauriat, which was secured by a first trust on the property at 1884 Newton Street, N.W., and that payments on this note were $82.50 per month and that Lt. Lauriat would not cut these payments to $70.00 a month.

"On December 3, 1956, I wrote you and advised you that $70.00 payments had been made to the Clarendon Trust Company on this note for the three months just past and that there was a balance of $37.50 due. I did not receive any response from you and I assumed that you would take care of the arrears. I am advised that you have not done so and that you have since made another$70.00 payment and that there would be a balance of $50.00 due.

"This is to advise you that if the payment of $50.00 is not made to the Clarendon Trust Company by January 1, 1957, and that all future payments of $82.50 are not made when they are due that I will request the trustees to immediately commence a foreclosure under the terms of the first deed of trust on this property."

9. Nothing further was heard from Sidney J. Brown or the plaintiff until a letter, dated February 4, 1957, was received by the undersigned counsel from Sidney J. Brown, which is as follows:

"I have been away and in my absence your letter came regarding the payment on 1884 Newton St., N. W., and today we received back the January payment which we made on this account.

"It is inconceivable to me that with all the problems both you and I have and especially in view of the letter which Lt. Lauriat sent reducing the payments, and on which I relied when I purchased the property, that you would spend your valuable time and mine writing letters and sending back payments which are tendered in good faith and which represent a difference of $12.50 per month. Especially in view of the past experience that the monthly payments are too high does it seem ridiculous to refuse to accept a regular monthly payment when tendered. If you want to fight about $12.50 a month you will have to do some convincing that you are right. No honest auctioneer will
12 attempt to foreclose for this small amount, nor will any judge allow you to exact through foreclosure a forfeiture or penalty in view of the small amount and the letter which I have.

"I suggest you accept this money every month and stop acting like a little boy who wants a red lollypop and is getting a green one. I am enclosing the January payment which the bank returned to me."

On February 5, 1957, the undersigned counsel addressed the following letter to Sidney J. Brown:

"I am in receipt of your letter of February 4, 1957, enclosing a check in the sum of $70.00, payable to the Clarendon Trust Company, which I am returning herewith.

"Under date of October 15, 1957, I wrote you advising you that the payments on the note secured by a trust on the premises 1884 Newton Street were in arrears for three months and on October 20, 1957, you wrote me asking that the payments be reduced to $70.00.

"On October 25, 1956, I advised you that I had written my client, Lt. Philip R. Lauriat, and that he would not agree to the reduction in the payments. I also talked to you on the telephone and explained the situation that the payments could not be reduced.

"On December 3, 1956, I wrote you advising you that only three $70.00 payments had been made and that the payments were $82.50 a month and that the balance should be paid immediately.

"On December 26, 1956, I wrote you a letter covering our past correspondence and stating that unless the back payments, totalling $50.00, were paid immediately and that the future payments of $82.50 a month were not made when due that a foreclosure would be requested.

"Since that time I have called your office on two occasions and called the day that I turned this matter over to the trustees to foreclose and you were too busy to answer my call or to return it.

"There will be a foreclosure on this property."

10. No information of any kind was received from Sidney J. Brown and the defendants herein, as trustees, were requested to proceed with the sale of the property in accordance with the terms of the trust.

The premises considered, the defendants pray:

13 1. That the temporary restraining order entered herein be set aside.

2. That the complaint filed herein be dismissed.

3. That the defendants have judgment against the plaintiff for such sums as will reasonably compensate them for the expenses incident to the delay of the sale of this property and for attorney's fees.

/s/ Cornelius H. Doherty
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Defendants

[CERTIFICATE OF SERVICE]

17 [Filed August 12, 1957]

MOTION FOR RECONSIDERATION OF MOTION FOR A PRELIMINARY INJUNCTION

Comes now the plaintiff by her attorney and moves the Court to reconsider her motion heretofore filed for a preliminary injunction and as reason therefor states as follows:

1. That the plaintiff contends she was not in default in the payments due on the trust sought to be foreclosed.

2. That from all of the attached exhibits it is clear that the property was purchased and title taken in her name under a foreclosure sale of a second trust at which time it was announced that the payments were reduced from $82.50 to $70.00, and acting upon such representation, and changing her position, the said property was purchased on belief that the same was true.

3. The attached exhibits shows there was no calculated intention to default and that an issue was raised.

4. Denial of the plaintiff's motion, in the light of her tender which is again made to pay all overdue payments on said trust at rate of $82.50 per month in order to make the holder whole operates as a forfeiture.

5. For other and further reasons that will be presented to the Court on the hearing of this motion.

/s/ Herman Miller
421-4th Street N. W.,
Attorney for Plaintiff

[CERTIFICATE OF SERVICE]

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20 [Filed August 12, 1957]

Lt. Philip R. Lauriat, USN
3809 Essex Circle
Norfolk, Virginia
30 September, 1956

Mr. J. G. Stone
4211 3rd Street
Washington 16, D. C.

Dear Sir:

I do not care to modify the terms of the note involved as they now stand.

There is nothing that I can see which prevents Booze from making such payments as he is able to towards any or all of the trusts involved, unless the second and third trusts contain the full payment and penalty interest stipulations which are more or less common to all notes these days. I will accept any amount he is able to pay, if it is acceptable with the collection agency, but I do not intend to modify the rate of repayment on a permanent basis.

Very truly yours,
/s/ P. R. Lauriat

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22 [Filed August 12, 1957]

October 20, 1956

Cornelius H. Doherty, Esq.
1010 Vermont Ave., N. W.
Washington, D. C.

Dear Mr. Doherty:

Please excuse the poor typing since I am without a secretary and I promised to write you by Monday.

As I advised you on the telephone, at the sale of this property there was exhibited to me a letter from Mr. Lauriat addressed to Mr. Stone, the holder of the 2nd trust, which indicated that the 1st trust holder would accept smaller payments. I believe the foreclosure resulted because the payments were too high and that the pattern for this property has been set as one of continued trouble and difficulty unless the payments are reduced. Now that I have entered the picture, I can assure you that if the payments are reduced to $7.50 per $1000 per month on the balance which is approximately $9300 making the payment $70 in round figures there will be no trouble with it any longer. I will personally guaranty that the payments will be made and you can check the validity of my promise with any bank or title company.

The settlement on this property is scheduled to take place around the 1st part of November and at that time the payments will be brought up to date and kept that way. Any reduction of course does not affect

the interest which continues that same. It only makes the note run a little longer, thus giving the holder more interest, and also clears the air so that he will get a regular payment every month and will not have to bother with wasting time asking for his money.

Very truly yours,

/s/ Sidney J. Brown

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28 [Filed August 12, 1957]

February 14, 1957

Mr. Sidney J. Brown
c/o First National Realty Co.
#2 Thomas Circle
Washington, D. C.

Dear Mr. Brown:

I talked to you a few days ago advising, that, as one of the trustees under the first deed of trust against Lot 35 in Square 2615, premises 1884 Newton Street, N. W., I had been asked to institute foreclosure proceedings. At the time you told me that a check was being mailed that day to the Clarendon Trust Company for monthly installments due to date.

The Trust Company tells me today that no payments have been made on the note since December 1956.

Mr. Cornelius H. Doherty, attorney for the first trust noteholder, now states that he wants payment of the note in full under the option permitted under the acceleration clause.

Please therefore contact Mr. Doherty and see if something can be done to prevent foreclosure, otherwise I shall have to proceed with the foreclosure sale in about two (2) weeks.

Very truly yours,

/s/ E. Spencer Fitzgerald
1413 Eye Street, N. W.
Washington, D. C.

ESF:mm

29 [Filed August 12, 1957]

February 15, 1957

Mr. Spencer Fitzgerald, Trustee
1413 Eye Street, N. W.
Washington, D. C.

Dear Mr. Fitzgerald:

With reference to your letter of February 14, regarding premises 1884 Newton St., N. W., please be advised that this note has been kept up to date by the tender of payments through the month of February, but apparently you have been misinformed by Mr. Doherty.

As I have explained to Mr. Doherty a half dozen times on the telephone, and in at least two or three letters, I purchased this property at public auction, pursuant to a foreclosure on a second trust, and at the sale Mr. James Stone, the holder of the second trust note, advised me that the first trust holder had agreed to reduce the monthly payment on the first trust and that he had a letter to that effect.

Relying on this statement, I purchased the property and thereafter Mr. Stone gave me the letter and I have it in my possession. In accordance with the representations made at the sale, and in conformance with the expression in the letter from the note holder, I brought the second trust up to date, making payments of $70.00 a month instead of the original $84.50. However, when I began to send in these monthly payments of $70.00, particularly for January and February, Mr. Doherty had the bank send them back to me. I have now sent them twice and they have been returned twice. There is nothing further I can do about this matter if they do not want to accept the payments I am sending.

I must caution all concerned, however, that I shall seek an injunction against any attempted foreclosure, and also damages against any meddling in this property. Apparently the note holder is not fully informed of how involved he might get in fighting with me over the $14.50 additional a month that Mr. Doherty is claiming I should be making. It is liable to cost him several hundred dollars in legal fees and court expenses and waste his and everybody else's time. I am sending a copy of

god and possibly his client doesn't realize he is getting involved over a small sum of money he doesn't lose anyway.

I have the payments here ready to forward once again if they will be accepted. More than that, I cannot do.

Very truly yours,

FIRST NATIONAL REALTY CORPORATION

/s/ Sidney J. Brown

SJB/gt

cc: Lt. Philip R. Lauriat, USN
3809 Essex Circle
Norfolk, Virginia

P.S. I enclose copies of two letters which I discussed with you.

AFTER 5 DAYS RE: TO
Clarendon Trust
COMPANY Arlington 10, Virginia

ARLINGTON FEB 1 '57 VA
U.S. POSTAGE 04

BEST COPY AV
from the original bo

Samsid Investments
2 Thomas Circle
Washington, D. C.

Returned By
CLARENDON TRUST COMPANY
Arlington, Va.

Reasons marked "X"	
Not Signed	
Not Properly Signed	
Signature Unsatisfactory	
Signature Not Authorized	
Not Properly Drawn	
No Payee	
Items Appear to be Altered	
Endorsement	
Not Drawn on This Bank	
Date	
Not Due	
Payment Stopped	
No Provision for Payment	
Pass Book Must Accompany Checks	
Insufficient Funds	
Drawn Against Uncollected Items	
Not Stamped by Bank	
Appears to have no such Account	
Account Closed	
Account Attached	
Drawer Supposed to be Dead	
Listed Against Us as ———	
Instructed To Return	
Refer to Maker	
No Signature Card on File	
Signature illegible	

Pay to the order of

SAMSID INVESTMENTS
REAL ESTATE INVESTMENTS
2 THOMAS CIRCLE, N. W.
WASHINGTON, D. C.

[redacted]

32 [Filed August 12, 1957]

AILABLE
nd volume

CLARENDON TRUST COMPANY
ARLINGTON, VIRGINIA

21 May 1957

Samsid Investments
2 Thomas Circle, N. W.
Washington 5, D. C.

Re: Property 1884 Newton St. N. W.
Trust Clarence D. Booze and
Jesse Roberts to P. R. Lauriat

Gentlemen:

We are returning herewith your Check No. 1585 in the amount of $330.00 as we have been instructed by attorney representing our customer as of January 28, 1957 to accept no further payments on this note.

Yours very truly,

/s/ W. Francis Castle
Vice President and Treasurer

WFC:ij
enclosure

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33 [Filed August 12, 1957]

May 22, 1957

Mr. Spencer Fitzgerald
District Title Insurance Co.
1413 I St., N. W.
Washington, D. C.

Dear Mr. Fitzgerald:

In accordance with your suggestion, I sent the regular payments on to the Clarendon Trust Company, covering premises 1884 Newton St., N. W. The enclosed reply rejecting the payments speaks for itself.

If these people think they are going to steal this property by rejecting payments and forfeiting my interest in it, they had better change their thinking because obviously no court will allow such a

thing to happen in view of the circumstances.

Very truly yours,

Sidney J. Brown

SJB/gt
Enclosure

P.S. I am enclosing the check. See what you can do with it.

SJB.

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36 [Filed August 13, 1957]

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

The above-entitled matter came on for hearing upon the complaint for an injunction and declaratory judgment, the motion for preliminary injunction, the temporary restraining order and the answer of the defendants and having been duly argued and considered it is by the Court, this 13th day of August, 1957, ORDERED that the motion for a preliminary injunction be, and the same hereby is, denied,

By The Court:

/s/ Edward A. Tamm
JUDGE

[Certificate Of Service]

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37 [Filed August 21, 1957]

ORDER DENYING MOTION FOR RECONSIDERATION OF MOTION FOR PRELIMINARY INJUNCTION

The above-entitled matter came on before the Court upon plaintiff's motion for reconsideration of the motion for a preliminary injunction and the defendant's opposition to this motion and having been duly considered, it is by the Court, this 21st day of August, 1957:

ORDERED, that the motion for reconsideration of the motion for a preliminary injunction be, and the same hereby, is denied,

By the Court:

/s/ Edward A. Tamm
Judge

[Certificate Of Service]

38 [Filed August 23, 1957]

NOTICE OF APPEAL

Notice is hereby given this 23rd day of August, 1957, that Esther Eden hereby appeals to the United States Court of Appeals for the District of Columbia from the orders of this Court entered on the 13th day of August, 1957 and August 21st., 1957 in favor of Francis A. J. Lauriat, E. Spencer Fitzgerald, Trustee and Joseph M. McNamara, trustee against said Esther Eden.

/s/ Herman Miller
Attorney for Plaintiff
421-4th Street, N.W.

BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED
DEC 30 1957
Joseph W. Stewart
CLERK

No. 14,148

ESTHER EDEN,

Appellant

v.

FRANCIS J. A. LAURIAT, et al

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Appellees

QUESTION PRESENTED

The question presented is whether a purchaser of property, bought subject to existing trusts, can vary the terms of that trust without the consent of the holder of the note secured by the trust.

INDEX

	Page
Counter-Statement of the Case	1
Summary of Argument	3
Argument	3
Conclusion	6

CASES CITED

Domus Realty Corp. v. 3440 Realty Co., 40 N.Y.S. (2d) 69, 41 N.Y.S. (2d) 940	5
Wheeler v. McBlair, 5 App. D.C. 375	5

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14, 146

ESTHER EDEN,

Appellant

v.

FRANCIS J. A. LAURIAT, et al

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

The appellee, Francis J. A. Lauriat, is the owner of a promissory note in the original sum of $11,000.00, payable $82.50 a month until paid. This note was secured by a first deed of trust on property in the District of Columbia known as Lot 35 in Square 2615, improved by premises known as 1884 Newton Street, N. W., Washington, D. C.

In September, 1956, the appellant purchased this property subject to the first deed of trust (App. 2). Settlement of the sale of this property was scheduled around the first day of November, 1956, and on October 20, 1956, Sidney J. Brown, acting for the owner, and apparently the owner, wrote counsel for appellee and, referring to a prior telephone conversation, requested a reduction of the monthly payments from $82.50 to $70.00 a month (App. 8-14). On October 25, 1956, Sidney J. Brown was advised that appellee Lauriat would not agree to a reduction of the payments and that payments in the original amount must be paid (App. 9). On December 3, 1956, Sidney J. Brown was again written and advised that the Clarendon Trust Company had informed counsel of the receipt of three $70.00 payments and that appellee Lauriat would not agree to any reduction in the monthly payments, and that the arrearage should be paid and that future payments should be made at the rate of $82.50 a month (App. 9).

On December 26, 1956, counsel again wrote Sidney J. Brown advising of the receipt of another $70.00 payment and informing him that if the balance of $50.00 due was not paid by January 1, 1957, the trustees would be requested to commence foreclosure proceedings under the terms of the first deed of trust (App. 10).

The appellant alleges that she sent $330.00 representing all installments which were due through May of 1957 at $82.50 a month, but the record will disclose that the sum of $330.00 would not bring the note up-to-date even on the basis of $70.00 a month. The appellant further alleges that she was not advised of the refusal of the payments until June 27, 1957 (App. 3), but the appendix has a letter, dated May 21, 1957, wherein the Clarendon Trust Company advised her that it had been instructed not to accept any further payments (App. 19).

On February 14, 1957, the trustee informed Sidney J. Brown that no payments were made on the note since December of 1956, and advised him that payment in full was requested under the option permitted under the acceleration clause, and the appellees, E. Spencer Fitzgerald and Joseph M. McNamara, trustees under the deed of trust, advertised the said property for sale at public auction for failure of the note holder to comply with the terms of the trust. The appellant then filed her complaint for an injunction and declaratory judgment and for a temporary restraining order, which was denied.

SUMMARY OF ARGUMENT

The appellant deliberately refused to comply with the terms of the trust and the note secured thereby and the Court properly refused to grant a preliminary injunction to restrain the sale of the property in accordance with the terms of the trust.

The appellant purchased the property knowing of the terms of the note and the trust securing it and under such circumstances the Court would have no authority to change the terms of the contract.

ARGUMENT

The Trial Court, after hearing, denied the appellant's motion for a preliminary injunction to restrain the appellees from selling the property in accordance with the terms of the trust and also denied a petition for a rehearing.

The situation presented by the appellant on this appeal is not that of a money hungry loan shark demanding a sale of the property for a failure to pay after a few days delay, and after substantial monies have been paid by the appellant. The record clearly indicates otherwise, for apparently prior to the time of the purchase of the

property by the appellant there were defaults by the prior owner and the letter from the appellee Lauriat to Stone (App. 13-14) would indicate that he would go along with Booze, the then owner, for a certain period of time but that he would not modify the rate of repayment on any permanent basis.

The appellant then enters the picture and the record accompanying the pleadings of the appellant in the Trial Court contains only the name of Sidney J. Brown, in care of First National Realty Corporation, and also Samsid Investments. This record clearly indicates that Sidney J. Brown, acting for himself as the owner through a straw person, definitely tried by threats and otherwise to require the appellee Lauriat to reduce the payments on the note. He was definitely informed prior to the time of the execution of the sale that the payments would not be reduced and the letters set forth in the appendix clearly indicate this. His letters to counsel and to the trustee indicate that it was his impression that no honest auctioneer would attempt to foreclose for the difference between $70.00 a month and $82.50 a month, and it was upon this theory that he attempted to coerce the appellee Lauriat into conforming to his views instead of the requirements of the note. He was given every opportunity to comply with the terms of this obligation.

It is indicated throughout the record on this appeal that a tender was made of the full amount due under the note. It is indicated in the complaint (App. 2) that at the time of the sale the payments were overdue on the first trust and it further indicates that they were overdue as of September of 1956. The allegations of the complaint and the letters from Sidney J. Brown indicated that in May of 1957, sufficient funds were sent to the Clarendon Trust Company to bring the payments up-to-date. September, 1956, through May of 1957 would be nine (9) months, or a total of $742.50, and Brown only made a tender

of a total of $610.00. No further tender was made at the time of the hearing and even if there was any further tender made there would be no requirement on the part of the appellee Lauriat to accept it under the circumstances as set out above.

No question apparently is raised by the appellant of the authority of the appellee trustees to sell the property upon a default in the payments due there-under, and the appellant can rely only upon any assistance that a chancellor feels would be proper under the circumstances.

The appellant indicates that the appellee Lauriat did not exercise his right to accelerate the payments under the note and that tender having been made before the demand for acceleration was made that there could be no foreclosure.

In the first instance there never was a proper tender and if it were necessary to make a demand to accelerate the payments under the note, then the letter from the appellee Fitzgerald, under date of February 14, 1957, clearly was sufficient (App. 15). The appellees do not concede that it is necessary to accelerate the payments in order to foreclose and contend that any default in any of the payments due under the note would be sufficient to require the trustees to proceed to sell the property at public auction. Wheeler v. McBlair, 5 App. D.C. 375.

The appellant cites the case of Domus Realty Corp. v. 3440 Realty Co. The citation is incorrect and should be 40 N. Y. S. (2d) 69, and which was affirmed in 41 N. Y. S. (2d) 940, but this case does not in any way support the appellant. This case does hold that a mortgagor cannot be relieved from a default in the absence of a waiver of the mortgagee or estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the mortgagee. It does hold that a mortgagee can strictly insist upon its contractual rights as between the parties.

If there was any bad faith or unconscionable conduct the record clearly indicates that it was on the part of the appellant.

Under the circumstances in this case, even though the appellant had made a tender or would make a tender of the full amount due to date, there should be no requirement on the part of the appellee Lauriat to accept such payment. He has submitted to various kinds of harassment for the purpose of requiring him to submit to the will of the appellant or her agents, and in the face of such conduct the law should not permit an individual to make a tender to avoid the foreclosure and then at some time in the immediate future to commence the harassment all over again. The appellee Lauriat is entitled to have the trustees sell the property in accordance with the terms of the trust.

CONCLUSION

It is respectfully submitted that the judgment of the Trial Court should be affirmed.

CORNELIUS H. DOHERTY
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorney for Appellees